Supreme Court, U. S.
FILED
MAY 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1656

CLARENCE E. EDMOND,

Petitioner,

vs.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

CLARENCE E. EDMOND, *PRO SE*,
38 Pleasure Bay Apartments,
Atlantic Avenue,
Long Branch, New Jersey 07740
(201) 229-1962

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

CLARENCE E. EDMOND,

Petitioner,

vs.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT, et al.,

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

The petitioner moves the Court for leave to file the petition for a writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing the Honorable The United States Court of Appeals for the Third Circuit, the Honorable Max Rosenn, the Honorable Harry E. Kalodner, the Honorable Leonard I. Garth, the Honorable Arlin M. Adams, and the Honorable Joseph F. Weis, Jr., Circuit Judges of the United States Court of Appeals for the Third Circuit, to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

Respectfully submitted,

CLARENCE E. EDMOND, *PRO SE*
38 Pleasure Bay Apartments
Atlantic Avenue
Long Branch, New Jersey 07740
(201) 229-1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

CLARENCE E. EDMOND,

Petitioner,

vs.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, *et al.*,

Respondents.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, THE HONORABLE MAX ROSENN, THE HONORABLE HARRY E. KALODNER, THE HONORABLE LEONARD I. GARTH, THE HONORABLE ARLIN M. ADAMS, AND THE HONORABLE JOSEPH F. WEIS, JR., CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Clarence, E. Edmond, prays that a Writ of Mandamus issue to cause the United States Court of Appeals for the Third Circuit to remand his case to the United States District Court for the District of New Jersey for trial on the merits or other proper proceeding.

JURISDICTION

The United States Court of Appeals for the Third Circuit denied petitioner's motion for judgment by default on December 6, 1976. Petitioner thereafter filed eight motions related thereto, and the Court entered an equal number of orders denying the relief demanded in said motions. The last of those orders was entered on May 11, 1977. This Petition for Mandamus was filed less than 90 days from the date of that order. The jurisdiction of this Court is invoked under 28 U.S.C., section 1651(a).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Constitution of the United States, Articles of Amendment, Amendment VII:

> "In suits at common law . . . the right of trial by jury shall be preserved . . ."

Federal Rules of Civil Procedure, *Rule* 38(a):

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties inviolate."

Rule 55(a):

> "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default."

Rule 11(5) (United States Court of Appeals for the Third Circuit), in relevant part:

> "A motion is affirmatively opposed only when a document is filed which clearly sets forth opposition to the relief sought in the motion, or any part thereof, and is filed within the time limitations of Rule 27, Federal Rules of Appellate Procedure."

STATEMENT OF THE CASE

1. On March 10, 1976, petitioner filed a complaint in the United States District Court for the District of New Jersey against the following-named respondents employed by the government of the State of New Jersey: Stanley C. Van Ness, Public Advocate; Judith A. Yaskin, Assistant Public Advocate; Howard Sims, staff lawyer (all of the Department of the Public Advocate); Vernon N. Potter, Director of the Division on Civil Rights; and Arthur N. Martin, Jr., deputy attorney general (both of the Department of Law and Public Safety). The complaint charged the respondents with three counts of conspiracy to subject petitioner, under color of state law, to the deprivation of his constitutional rights to due process of law and equal protection of the laws, violations of the Fourteenth Amendment cognizable under 42 U.S.C., section 1983. The Appellate Division of the Superior Court and the Supreme Court of New Jersey were properly implicated in the conspiracy alleged in the complaint. Petitioner demanded a trial by jury.

2. The case for conspiracy had its origin in a piece of advice given by respondent Sims to the Office of Citizen Complaints, an investigative unit allocated within the Department of the Public Advocate. The advice given by Sims was that the said office ought not to pursue any further the case brought before it by petitioner in August of 1974 unless a disclaimer could be secured of petitioner's previously stated intention subsequently to sue for damages persons who more than eight years ago allegedly committed against petitioner several tortious acts specifically proscribed by the Constitution and laws of the United States.

3. The respondents, represented by William F. Hyland, Attorney General of New Jersey, did not answer

the allegations alleged in the complaint. They instead filed a motion for summary judgment supported by a brief advancing arguments based upon fraudulent application of the principles of *res judicata* and collateral estoppel.

4. Petitioner, to defeat the relief demanded in said motion, responded thereto, with an eye to *Rule* 56(c) of the Federal Rules of Civil Procedure, setting for specific facts showing conclusively the existence in the matter of several genuine issues as to material facts.

5. The aforesaid United States district court, Honorable George H. Barlow presiding, on June 2, 1976, entered summary judgment for the respondents, despite the said showing of material fact issues. As a result thereof, petitioner, on July 6, 1976, instituted proceedings in the United States Court of Appeals for the Third Circuit.

6. Petitioner served his brief on respondents on September 14, 1976. Their paper in opposition thereto was due to be filed and served on or before October 18, 1976, thirty-three days after service of petitioner's brief upon them. They did not serve it, however, until October 20, 1976, thirty-five days after service upon them of petitioner's brief, in violation of *Rules* 25(a) and 26(b) of the Federal Rules of Appellate Procedure.

7. Petitioner forthwith filed a motion for judgment by default, demanding in effect that the court below remand the case to the district court for trial on the merits or other proper proceeding. The motion for default judgment is herein set forth as Appendix A.

8. After the filing of the motion for judgment, respondents, aided by the office of the clerk, thrice attempted to file their brief out of time, in violation of *Rule* 26(b) of the Federal Rules of Appellate Procedure. (They had

already served it on October 20, 1976, two days after the expiration of the time fixed for filing and service, without first having shown good cause therefor upon motion.) For the convenience of the Court, a description of the three attempts here mentioned is set forth herein as Appendix B.

9. The Court, on December 6, 1976, denied petitioner's motion for judgment and ordered petitioner to file a reply brief. The Court's order is herein set forth as Appendix C.

10. On December 16, 1976, petitioner filed a motion for reconsideration and vacation of that order, arguing that the Court had no lawful authority to deny petitioner's motion and to order petitioner to file a brief in reply to respondents' brief, and that a filing by petitioner of the reply brief in question would constitute an idle act having no relation to the purpose to be served, since, by default, the matter on appeal had already been legally concluded in favor of petitioner. Petitioner's motion to that effect is herein set forth as Appendix D.

11. The Court, on December 22, 1976, denied the motion, having done so in the absence of any opposition whatsoever on the part of respondents to the relief demanded therein. The Court asserted in its order that it was not referring to petitioner when it ordered that "[a]ppellant's reply brief will be filed"; rather, it claimed, it was directing the clerk of the court to file petitioner's brief in reply to respondents' brief in opposition to petitioner's motion for judgment by default. The Court's order of December 22nd is herein set forth as Appendix E.

12. On December 27, 1976, petitioner filed a motion for reconsideration and vacation of that order and for an order remanding the case to the district court, pointing out the facts that the respondents had failed to answer the precedent motion (which failure by rule established the

facts therein alleged) and that they also, by default, had failed to answer the allegations presented by petitioner in his brief on the appeal (which, in like manner with their failure to answer the aforesaid motion (of December 16th), established the facts alleged therein. Petitioner's motion of December 27th is herein set forth as Appendix F.

13. The Court, in the absence of any opposition to the motion on the part of respondents, on January 6, 1977, denied the motion. The Court's order is herein set forth as Appendix G.

14. On January 13, 1977, petitioner filed another motion for reconsideration and vacation of order, this time charging the Court with having acted arbitrarily and unlawfully in its denial of the precedent motion. The motion so charging the Court is herein set forth as Appendix H.

15. The Court, on January 24, 1977, denied the motion, basing its decision on a letter sent by respondents to the clerk of the court, which letter was submitted in response to "[petitioner's] third motion for reconsideration of his motion for an order to strike respondents' brief [on the appeal]". The Court's order of January 24th is herein set forth as Appendix I. (It should be noted that this particular order was entered by Judges Rosenn and Kalodner only, whereas Judge Garth, too, was present at the entry of the previous three orders.)

16. On January 31, 1977, petitioner filed a motion for an order directing respondents to furnish the Court and the petitioner with copies of the motion allegedly filed by the latter requesting an order to strike respondents' brief, and for reconsideration and vacation of the precedent order. Petitioner's motion of January 31st is herein set forth as Appendix J.

17. The Court (Judges Rosenn and Kalodner), in the absence of any opposition to the motion on the part of

respondents, on February 4, 1977, denied the relief requested therein. The Court's order of February 4th is herein set forth as Appendix K.

18. On February 16, 1977, petitioner filed a motion for reconsideration and vacation of the precedent order (exclusive of that aspect of said order which requested that the Court direct respondents to furnish copies of the motion wherein petitioner had (allegedly) asked the Court for an order striking their brief on the appeal. Also, petitioner requested again that the case be remanded to the district court (for trial on the merits or other proper proceeding), pointing out that the Third Circuit, in like manner with the district court, was improperly subjecting petitioner to the deprivation of his Seventh Amendment right to a trial by jury. Petitioner's motion of February 16th is herein set forth as Appendix L.

19. The Court (Judges Rosenn, Kalodner, and Garth), on March 2, 1977, denied the motion, having done so again in the absence of any opposition on the part of the respondents to the relief demanded therein. The Court's order of March 2nd is herein set forth as Appendix M.

20. On March 25, 1977, petitioner filed a motion for reconsideration and vacation of that order, indicating therein that a denial of the relief demanded therein would constitute an outrageous and persistent display of contempt of the pertinent rules of civil-appellate procedure and of the Seventh and Fourteenth Amendments to the Constitution of the United States. Petitioner's motion of March 25th is herein set forth as Appendix N.

21. Judge Rosenn alone, on March 31, 1977, denied the motion, presumably having based his decision on a letter submitted by respondents to the clerk of the court, which letter indicated their reliance on a previously filed

brief and letter as opposition to the motion referred to in the preceding paragraph. Judge Rosenn's order of March 31st is herein set forth as Appendix O.

22. On April 5, 1977, petitioner, pointing to the utter insufficiency of respondents' pleadings, filed a motion requesting that the Court review and vacate the order entered therein by Judge Rosenn on March 31st. Petitioner's motion of April 5th is herein set forth as Appendix P.

23. Judge Rosenn, On April 11, 1977, without cause or comment, denied the motion. The order is herein set forth as Appendix Q.

24. On April 25, 1977, petitioner filed a motion for reconsideration and vacation of that order, calling the Court's attention to the fact of respondents' failure to oppose the motion in question, which failure confirmed the allegation propounded in said motion pertaining to the insufficiency of the pleadings filed in opposition thereto by the respondents. Petitioner's motion of April 25th is herein set forth as Appendix R.

25. The Court (Judges Adams, Rosenn, and Weis), on May 11, 1977, denied the motion, having done so in the absence of any opposition whatsoever on the part of the respondents to the relief demanded therein. The Court's order of May 11th is herein set forth as Appendix S.

REASONS FOR GRANTING THE WRIT

This Court, speaking through Justice Black, stated in *Beacon Theatres v. Westover*, 359 U.S. 500, 511 (1959): ". . . the right to grant mandamus to require jury trial where it has been improperly denied is settled." And, in 1957, the Court regarded the case of *La Buy v. Howes Leather Co.*, 352 U.S. 249, as one as to which mandamus was a proper remedy ". . . as a means of policing compliance with the procedural rules." *Will v. United States*, 389 U.S. 96, 100, n.10 (1967).

Petitioner contends that the action of the Third Circuit heretofore recounted, specifically its repeated and unwarranted refusal to remand petitioner's case to the district court for trial on the merits or other proper proceeding, constitutes both persistent disregard of the Rules of Civil-Appellate Procedure promulgated by this Court, and of the Rules governing its own practice and supplementing the Federal Rules of Appellate Procedure, and unauthorized obstruction to a potential exercise of this Court's appellate jurisdiction, in a manner not remediable through the ordinary course of appeal. The action of the Third Circuit is therefore one which this Court can and should correct by a writ of mandamus. And by reason of the Third Circuit's situation within the judicial hierarchy directly beneath this Court, the relief sought herein is not available in any other court. *Williams v. Simons*, 355 U.S. 49 (1957).

Wherefore, petitioner prays:

1. That a writ of mandamus issue from this Court directed to the Honorable United States Court of Appeals for the Third Circuit, the Honorable Max Rosenn, the Honorable Harry E. Kalodner, the Honorable Leonard I. Garth, the Honorable Arlin M. Adams, and the Honorable

Joseph F. Weis, Jr., Judges of said Court, requiring said Honorable Max Rosenn, said Honorable Harry E. Kalodner, said Honorable Leonard I. Garth, said Honorable Arlin M. Adams, and said Honorable Joseph F. Weis, Jr., to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable Max Rosenn, said Honorable Harry E. Kalodner, said Honorable Leonard I. Garth, said Honorable Arlin M. Adams, and said Honorable Joseph F. Weis, Jr., to remand petitioner's case to the United States District Court for the District of New Jersey for trial on the merits or other proper proceeding.

2. That petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

CLARENCE E. EDMOND, *PRO SE*

APPENDIX A

MOTION FOR JUDGMENT BY DEFAULT
(October 27, 1976)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PLEASE TAKE NOTICE that I, Clarence E. Edmond, plaintiff-appellant *pro se* herein, respectfully move the Court hereby, pursuant to Rule 55 of the Federal Rules of Civil Procedure (F.R.C.P.), to enter a judgment by default against the above-named defendant-respondents for the following reasons:

On September 14, 1976 I served on counsel for the defendants two copies of both an affidavit and a brief, the originals of which were filed with the clerk of this Court on September 15, 1976. The defendants' pleadings relative thereto were due to be filed by *October 18, 1976*. Rule 25(a) of the Federal Rules of Appellate Procedure (F.R.A.P.) provides that ". . . filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs . . . shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail . . . is utilized."

On *October 19, 1976*, approximately 1:05 P.M., I was informed by a Ms. Simon of the Office of the Clerk that as of that date there was no record of any papers having been filed therein by the defendants.

On *October 21, 1976* I received a notice from the post office in Long Branch, New Jersey, summoning me there

to obtain a piece of certified mail. The package (postmarked *October 20, 1976*) had been mailed from Trenton, New Jersey, by the Office of the Attorney General of this State and contained two copies of a brief prepared on behalf of the above-named defendants.

Rule 26(b), F.R.A.P., provides as follows: "The court for good cause shown may *upon motion*," (emphasis added), "enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time . . ." (It will be recalled that I was required not long ago to file a motion pursuant to this rule for a court order allowing the appeal to be docketed, and the record to be filed, out of time. A copy of that motion was duly served upon the defendants.)

Accompanying the briefs sent me by the defendants was a letter dated *October 19, 1976*, addressed to the clerk of the court and signed by a Deputy Attorney General, Mary Catherine Cuff, Esq. (who had written the brief), indicating that the original and twenty-four copies of the brief were enclosed therewith and that by the said letter, "defendants-appellees brief has been served on Clarence Edmonds [sic], Plaintiff-Appellant in this matter."

Obviously the defendants' brief was not filed (mailed) within the time fixed for filing (October 18, 1976). This fact was confirmed by both Ms. Simon aforementioned and Chief Deputy Clerk Ferguson who informed me by telephone on *October 22, 1976*, approximately 1:15 P.M., that no papers (including motion for leave to file out of time) had yet been received in the clerk's office from the defendants.

There is no question in my mind as to what the defendants were contemplating when they failed to effect a

timely filing of their papers: the possibility of obtaining favorable consideration by this Court of the specious concoction they served upon me on October 20th, without having to challenge the merits of the factual and legal contentions set forth in my brief and affidavit.

The paper sent me by the defendants in no way addresses the issues I presented for review by this Court, which points to the ineluctable conclusion that the defendants deliberately allowed the time for filing their papers to pass, with the obvious intention of unlawfully imploring this Court to recognize the deceptive arguments set forth in their brief, and, in the event that the Court unanimously indulged their supplications, of leaving me at the mercy of that awesome and unpredictable discretionary authority of the United States Supreme Court to review or not to review a given case.

Had I unwittingly answered the defendants' pleadings, that, for the defendants' purposes, would have constituted tacit approval on my part of their having filed their paper out of time, and, if the Court permitted it, of the submission of the briefs to the Court for its consideration of the merits.

The Federal Rules of Appellate Procedure do not provide for the filing of papers out of time by stipulation of the parties; so that the defendants' having served their brief upon me out of time without first having moved the Court for permission so to do constitutes violations not only of the applicable Federal Rules of Appellate Procedure but also of my right to due process of law under the Fourteenth Amendment.

By reason of the defendants' failure in this action "to plead or otherwise defend as provided by these rules" (see

Rule 55(a), F.R.C.P.), and in light of the foregoing discussion, it is hereby respectfully submitted that I, the plaintiff herein, am entitled as a matter of law to the judgment demanded on this motion.

Respectfully submitted,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND,
Pro Se

APPENDIX B

BRIEF IN REPLY TO OPPOSITION TO MOTION FOR JUDGMENT BY DEFAULT

[in relevant part]

(November 26, 1976)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

POINT I

THE DEFENDANTS HEREIN ARE ATTEMPTING FOR THE THIRD TIME TO UNLAWFULLY FILE AND SERVE THEIR BRIEF OUT OF TIME.

The defendants' first attempt to accomplish the unlawful act indicated in POINT I above occurred on October 20, 1976 when they served the plaintiff herein with two copies of their brief which unquestionably was due to be filed on or before October 18, 1976. Their letter of October 19, 1976 to the clerk of the court, by which the untimely service was completed, was so dated clearly in the hope that the plaintiff might consider the one days delay of service of no serious consequence, file a reply brief and thereby tacitly approve the defendants' delayed and improper service. They then, no doubt, were going to concoct and set forth on motion any plausible excuse for the delayed service, indicate to the Court that the plaintiff apparently had had no objections to the same, as evidenced by the plaintiff's (hoped-for) reply brief, and *then* move the Court to allow them to file their brief out of time. The defendants obviously had not anticipated the plain-

tiff's telephoning the Office of the Clerk (first on October 19th, and again on October 22nd, 1976) and determining thereby that the defendants' brief had not yet been received therein.

Having immediately perceived the defendants' strategy relative to the improper service and attempted filing of their brief, the plaintiff forthwith prepared, filed and served his motion for judgment by default, indicating therein that the defendants had failed to plead or otherwise defend as provided by the applicable federal rules of appellate procedure, having failed, as they did, to file and serve their brief within the prescribed time and to file a formal motion requesting leave to file and serve their brief out of time. It was that particular action by the plaintiff (the unexpected filing of a motion for judgment by default) which occasioned the defendants' second attempt to unlawfully file and serve their brief out of time, which attempt took the form described briefly hereunder.

The defendants sent a letter (dated October 28, 1976) to the clerk of the court, indicating therein that there were enclosed therewith for filing the original and twenty-four (24) copies of Brief submitted on behalf of defendants-appellees. . . ." (See defendants' brief opposing motion for judgment by default, pp. 8a, 9a.) This letter sets forth an incredible yarn (probably unique in the history of jurisprudence) concerning a mysterious returning of the twenty-four briefs above mentioned to the Office of the Attorney General of New Jersey. With emphasis the plaintiff points out here that the aforesaid letter of October 28th is a business letter, which type of letter educated letter writers know properly closes with "Yours truly" or "Very truly yours" The defendants, however, deliberately closed theirs with "Respectfully submitted," a closing which in legal matters is normally employed in the submission of

formal papers (complaints, briefs, motions, etc.). The defendants' obvious intention here was to induce the plaintiff to regard their letter of October 28th to the clerk of the court as a formal motion for leave to file their brief out of time. (The letter from the clerk of the court to the plaintiff, dated November 2, 1976, annexed hereto as Exhibit "A", substantially corroborates this theory.) (See Motion for Judgment by Default, p. 3, last two pars. for some insight into the defendants' intentions had the plaintiff fallen prey to this particular scheme.)

Having immediately perceived the defendants' strategy relative to their letter of October 28, 1976, the plaintiff responded by way of a letter (dated November 4, 1976) to the clerk of the court. (See Exhibit "B" annexed hereto.) It was that letter which motivated the defendants to make their third attempt to unlawfully file their brief out of time. This third attempt revolves around the defendants' brief opposing the motion for judgment by default, as we shall see, presently.

In the defendants' letter of October 28, 1976 to the clerk of the court, they allege plainly that (1) "The . . . brief was served upon plaintiff-appellant Clarence E. Edmond on *October 19, 1976*"; (2) "*at the same time*, the requisite copies of the brief were served upon the U.S. Court of Appeals for the Third Circuit"; (3) "The package was deposited in the mail at Trenton, New Jersey on *October 19, 1976*"; and (4) that "I herewith transmit . . . a copy of the Affidavit of Service executed October 19, 1976." (emphasis added)

However many times one might count the days from, but not including, September 14, 1976 (the date on which the plaintiff served his brief on the defendants) to October 19, 1976 (the date on which the defendants allegedly filed

and served their brief), one would find consistently that the defendants (allegedly) filed and actually served their brief thirty-four (34) days after September 14, 1976, one day after the expiration of the time fixed for filing (October 18, 1976), and that they allegedly and actually (in the case of service) did so without first having duly executed a formal motion before this Court for leave so to do, clearly violations of Rules 25(a) and 26(b) of the Federal Rules of Appellate Procedure, and of the plaintiff's right to due process of law, since the plaintiff was never served with a copy of any such motion, with the result that he has thereby been deprived of an opportunity to exercise his legal right to oppose the same.

It is emphatically submitted here that the defendants' brief was due to be both filed and served on or before October 18, 1976. And since the defendants admit that they both filed and served it on October 19, 1976, their assertion at p. 2, lines 20, etc., to the effect that they placed it in the mail for filing (which act in and of itself constitutes filing) within the time prescribed by the applicable federal rules of appellate procedure is a glaring contradiction in terms.

With respect to contradictions, let us turn to p. 5, last par., and p. 6 of the defendants' brief opposing the motion for judgment by default. The defendants write: "Although service upon the plaintiff did not occur within the time prescribed by the rules, it must be emphasized that every effort was made to accomplish service within the prescribed time, that the delay was purely inadvertent . . ." "it is requested that the Court . . . allow service upon Mr. Edmond which extended *one* day beyond the time prescribed by the rules."

Now let us return to p. 5, footnote. The defendants write: "That the briefs placed in the mail for filing . . .

were returned to this office under circumstances outlined in the letter dated October 28, 1976 cannot obscure the fact that *timely service upon plaintiff was accomplished.*" (emphasis added)

If, as the defendants allege at p. 4 of their brief opposing the motion for judgment by default, "defendants' brief was due to be filed on October 19, 1976 . . ."; and if in fact that "was the day the brief was originally served upon plaintiff and placed in the mail for filing . . ."; and if those acts were properly carried out as prescribed by the federal rules of appellate procedure, why are the defendants now requesting at p. 6 of their brief "that the Court relax the rule governing service"?

The facts are that the defendants actually served, and (allegedly) filed, their brief out of time without first having sought the Court's permission so to do upon formal motion, and they are now attempting to rectify those serious blunders by seeking the said permission via their brief opposing the plaintiff's motion. But the Federal Rules of Appellate Procedure do not provide for the obtaining of the relief sought after by the defendants via that particular technique, so that the defendants therefore continue to be out of order.

EXHIBIT "A"

November 2, 1976

Mr. Clarence E. Edmond
38 Pleasure Bay Apartments
Atlantic Avenue
Long Branch, N.J. 17740

Re: Clarence E. Edmond, Appellant vs. Department of the Public Advocate, et al.

No. 76-2164

Dear Mr. Edmond:

Receipt is acknowledged on October 29, 1976, of your letter dated October 22, 1976 in the above-entitled case. We received on November 1, 1976 the brief for appellees. On that same date, we requested counsel for appellees to forward to you a copy of her letter dated October 28, 1976, explaining the delay in filing appellees' brief.

Very truly yours,

/s/ T. F. Quinn
T. F. QUINN
Clerk

TFQ/ags

EXHIBIT "B"

November 4, 1976

Mr. Thomas F. Quinn, Clerk
United States Court of Appeals
21400 U. S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: Edmond v. Department of the Public Advocate, etc., et al

Docket No. 76-2164

Dear Mr. Quinn:

Please refer to the motion for judgment by default that I filed with the Office of the Clerk, and served on the defendant parties to the above-entitled matter, on October 27, 1976. In that motion I indicated that (1) the defendants' pleadings relative to the aforesaid matter were due to be filed by *October 18, 1976* (the time fixed for filing); (2) that the defendants served their brief upon me, the plaintiff herein, on *October 20, 1976* (two days after the expiration of the time fixed for filing); and (3) that the defendants' brief was not filed with (mailed to) the Office of the Clerk within the time so fixed (33 days from September 14, 1976–October 18, 1976).

Annexed hereto is a copy of a letter dated October 28, 1976, addressed to you and issued from the Office of the Attorney General of New Jersey. The said letter clearly confirms the allegations set forth on my motion alleging that the defendants indeed served their brief upon me out of time without first having moved the Court for per-

mission so to do. The defendants allege in their letter that they both filed their brief and served it upon me on *October 19, 1976*, despite my assertion that they served it upon me on October 20, 1976. (A postal official on this date, November 3, 1976, in response to my queries, affirmed that if the package the defendants sent me was postmarked October 20, 1976, that is definitely when it was mailed.) But that is not the crucial point here. The essential fact is that the defendants, by their own admission, (allegedly) filed and served their brief on *October 19, 1976*, the day after the expiration of the time fixed for filing, and, by implication, that they (allegedly) did so without first having duly executed a motion before this Court for leave so to do.

Even were we sufficiently gullible to credit the defendants' explanation as to why their brief (allegedly filed and served on October 19, 1976) was returned to them, that explanation would still in no way enlighten us as to why it was not filed and served on or before October 18, 1976.

Moreover, the defendants have indicated in their letter of October 28, 1976 that they enclosed therewith *for filing* not the original and three copies of a motion for leave to file their brief out of time but "the original and 24 copies of Brief submitted on behalf of defendants-appellees . . . ." (ten (10) days, now, after the expiration of the time fixed for filing!).

It is respectfully submitted here that the Office of the Clerk (acting alone) has no lawful authority at this stage of the proceedings to file the defendants' papers, although the defendants allege at page two of their letter of October 28, 1976 that they acted upon the advice of the "Office of the Clerk" in transmitting "the requisite number of copies of the brief . . . ."

It is further submitted here that the defendants have not shown, cannot show, and have no intention of ever attempting to show, good cause upon motion as to why the Court should allow them to file their brief out of time, and, consequently, they legally have not filed, and lawfully may not ever file, any papers whatsoever relative to this case.

In view of the foregoing, I respectfully request that the aforesaid motion I filed herein on October 27, 1976 be forthwith submitted to the Court for action thereupon.

Very truly yours,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND

cc: Helen Forsyth, Esq.
Deputy Attorney General
State House Annex
Trenton, New Jersey 08625

P.S. Please note that the defendants have not yet answered the allegations contained in my motion for judgment by default, particularly the one alleging that they deliberately allowed the time for filing their papers to pass.

The defendants' letter of October 28, 1976 annexed hereto clearly constitutes an attempt on the part of the defendants to circumvent the requirement that they submit a formal motion to the Court for leave to file their papers out of time.

APPENDIX C

DENIAL OF MOTION, ETC.
(December 6, 1976)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

Present: ROSENN, KALODNER, and GARTH, Circuit Judges

1. Appellant's motion for judgment by default and Affidavit by Clarence E. Edmond in support of motion,

2. Letter dated November 4, 1976 from appellant with enclosure, copy of letter dated October 28, 1976 from counsel for appellee to Clerk, in regard to appellant's motion for judgment by default,

in the above listed for Monday, November 29, 1976, or as the Court decides.

The foregoing Motion is denied. Appellant's reply brief will be filed.

/s/ Max Rosenn
MAX ROSENN

APPENDIX D

MOTION FOR RECONSIDERATION AND VACATION OF ORDER

(December 16, 1976)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PLEASE TAKE NOTICE that I, Clarence E. Edmond, plaintiff-appellant *pro se* herein, respectfully move the Court hereby, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure (F.R.A.P.), for reconsideration and vacation of the order entered herein by the Court on December 6, 1976 denying the motion for default judgment filed herein on October 27, 1976 and ordering plaintiff to file a reply brief, for the following reasons:

POINT I

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AT THE CURRENT STAGE OF THE PROCEEDINGS, PROPERLY MAY NOT DENY PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT AND ORDER THE FILING OF A REPLY BRIEF BY PLAINTIFF.

A. On October 27, 1976 plaintiff filed with the clerk of this Court a motion for judgment by default, asserting therein that the defendant parties to this action, on October 20, 1976, served upon plaintiff two copies of a brief (on the merits of the appeal), which brief was due to be both filed and served on or before October 18, 1976. As

was noted on said motion, defendants served their brief after the expiration of the time fixed for filing and service, contrary to Rules 25(a) and 26(b) of the F.R.A.P.

Fourteen (14) days after the expiration of the time fixed for filing and serving a response to plaintiff's motion by default, defendants filed a brief in opposition to said motion, time wise a violation of Rule 27(a) of the F.R.A.P. Plaintiff forthwith indicated by way of a brief in reply to defendants' opposition brief that the latter was essentially a third attempt on the part of defendants to unlawfully file and serve their brief on the merits out of time; in other words that the opposition brief was filed in the place of the formal motion required by Rule 26(b) of the F.R.A.P.

The order entered by this Court on December 6, 1976 directing that "Appellant's reply brief will be filed" implies that the Court has enlarged the time fixed for the filing and service of defendants' brief, *after* they have already served it without first having moved the Court for leave so to do as is required by Rule 26(b) herein.

Rule 47 of the F.R.A.P. provides in relevant part that "Each court of appeals by action of a majority of the circuit judges in regular active service may . . . make and amend rules governing its practice *not inconsistent with these rules.*" (emphasis added)

Rule 27(a) of the F.R.A.P. provides in relevant part as follows: "*Unless* another form is elsewhere prescribed by these rules, an application for an order or other relief *shall be made by filing a motion* for such order or relief with proof of service on all other parties. (emphasis added)

Since defendants' brief in opposition to plaintiff's motion by default is the only paper by which defendants have demanded relief in the form of an order allowing them

to file and serve their brief on the merits out of time, we must reasonably conclude that the Court's decision of December 6th herein is an affirmative response to that particular demand. And since the aforesaid brief is obviously not a motion, as evidenced by both the physical and the substantive characteristics which sharply distinguish the brief from the motion, we must reasonably conclude also that the Court, by its order of December 6th, has further allowed defendants' opposition brief to operate in the capacity of a formal motion.

Nowhere in the Federal Rules of Appellate Procedure is there any method prescribed for application to the Court for leave to do any act after the expiration of the time fixed by the rules other than that set out in subdivision (b) of Rule 26, which specifically calls for the filing of a motion; so that this Court, by allowing defendants to file and serve their brief at the current stage of the proceedings, has apparently amended or made rules governing its practice clearly inconsistent with the rules herein. (In the event that the Court should deny the relief demanded on the present motion, we forever in the future should reasonably and properly expect to be able to obtain copies of the rules so made or amended from the Administrative Office of the United States Courts—barring, of course, any stringent intervention or disapproval on the part of the United States Supreme Court with respect to the promulgation of such rules.)

B. In their brief opposing plaintiff's motion by default, defendants cleverly expanded the relief demanded on said motion by including therein an *in pari materia* request for an order striking their brief on the merits. The objective there was to induce plaintiff to argue that said brief should indeed be stricken, so that such an argument might give the impression that defendants' brief had

actually been legally processed. Plaintiff, under POINT II of his brief in reply to defendants' opposition brief, pointed out that he in fact had not moved the Court for any order striking defendants' brief, and argued that, since defendants *legally* have neither filed nor served the brief in question, which in effect constitutes a failure on their part to have filed it and served it, there would be no rational basis for any such motion nor for an order granting any such relief demanded thereon. Clearly, the present situation with respect to defendants' brief is the same as would exist had they written no brief at all; in other words, defendants' brief on the merits is legally nonexistent.

It is on the basis of this elementary principle, and on that of other factors of equally compelling force, that plaintiff respectfully moves the Court hereby to reconsider and vacate its denial of the aforesaid motion and its controversial order directing that appellant file a reply brief herein. With all due respect to the Court, it is urgently submitted here that plaintiff is truly at a loss as to how to proceed to write a brief in reply to a brief that does not exist. (It should be noted here too that plaintiff has to date responded and/or replied to every pertinent paper *legally* filed and served by defendants throughout both past and present judicial proceedings.)

To deny plaintiff the relief demanded on the motion by default is to unreasonably deny him relief he is entitled to as a simple matter of law. But to order him to file a reply brief, in view of the foregoing discussions, is to order him to assume the posture of a full-blown idiot—that is, of course, if the Court in fact is ordering plaintiff to address himself to issues which (legally) have never been argued by the defendants. (It is not fanciful to suggest here that the blind fulfillment of such irra-

tional mandates could some day result in one's jumping from the likes of the Brooklyn Bridge.

Project, for a moment, such an order herein: The foregoing Motion is denied. Appellant will jump from the Brooklyn Bridge.)

POINT II

THE FILING OF A REPLY BRIEF AT THE CURRENT STAGE OF THE PROCEEDINGS WOULD CONSTITUTE AN IDLE ACT HAVING NO RELATION TO THE PURPOSE TO BE SERVED, SINCE THE APPEAL HEREIN HAS ALREADY BEEN LEGALLY AND CONCLUSIVELY DETERMINED IN FAVOR OF THE PLAINTIFF.

A. On September 15, 1976 plaintiff filed an appeal herein from the opinion and order of the United States District Court for the District of New Jersey, Honorable George H. Barlow presiding, entering summary judgment, on June 2, 1976, in favor of the defendants herein. The issues presented for review by this Court were the following: (1) that the District Court entered summary judgment for the defendants on the basis of a review of state court proceedings rather than on the basis of a determination as to whether on the face of the record there appeared to be any genuine issues as to material fact; (2) that the District Court entered summary judgment for defendants in the presence of genuine issues of material fact; (3) the assertion by the District Court that the matter there pending presents no federal constitutional issues cognizable under 42 U.S.C., section 1983; and (4) the District Court's assertion that plaintiff brought his action there pursuant to 28 U.S.C., section 1343 (3), the jurisdictional counterpart of 42 U.S.C., section 1983.

In addition to the foregoing issues presented for review, plaintiff, in his brief, argued the following points: (1) the court below has unlawfully acted as if it were a court of appeals; (2) a United States district court may not grant summary judgment in the presence of a genuine issue of material fact; (3) the court below erred in asserting that plaintiff's complaint presents no federal constitutional issues cognizable under 42 U.S.C., section 1983; and (4) plaintiff did not bring his district court action pursuant to 28 U.S.C., section 1343 (3), since at the current stage of the proceedings he is not entitled to monetary damages pursuant thereto.

The failure on the part of defendants to file and serve their brief within the time prescribed and in accordance with the method provided by the applicable federal rules of appellate procedure constitutes a failure on their part to address themselves not only to the aforesaid issues presented for review but also to the aforesaid points of contention. Accordingly, all the issues of fact and of law set forth in plaintiff's brief have by law been definitively established in favor of the plaintiff. For this reason too, therefore, the filing herein of a reply brief by plaintiff would clearly serve no useful purpose. And by reason of defendants' failure to plead or otherwise defend as provided by the applicable federal rules of appellate procedure, plaintiff properly moved herein pursuant to Rule 55 [of the Federal Rules of Civil Procedure] for an order entering judgment by default against defendants.

While fully recognizing the nature of *per curiam* decisions generally, we cannot but proceed to demand a rational explanation of the reasons or principles by which the Court arrived at its decision of December 6th to deny plaintiff's motion for judgment by default and to order the filing herein of a reply brief by plaintiff; for without

such an explanation, we can only regard said actions by the Court as flagrant abuses of judicial discretion.

Short of pressing for an explanation of the aforesaid decision, we would simply iterate the request for the relief demanded on the present motion and again ask that the Court grant the relief demanded on the motion preceding (judgment by default).

B. There are yet other compelling reasons as to why the Court should reconsider and vacate the aforesaid order of December 6th: Even if the Court denied this motion and insisted that plaintiff file the reply brief in question, plaintiff properly would not do so for the reasons herein. The Court in that case might exercise one of two options: it could (1) lawfully render a decision in favor of plaintiff, based on the legally recognizable issues of fact and of law set forth in his brief and affidavit, or (2) unlawfully render a decision in favor of defendants, who, as noted herein and elsewhere, have presented *no issues of fact and of law legally recognizable* by the Court. Since the cornerstone of our legal system is the adversary proceeding, which requires, among other things, the timely and proper filing and service of any pertinent papers, a decision by this Court to pursue option (2) above would clearly constitute an unlawful and improper relaxation of these vital judicial requirements. One would have to be frightfully obtuse to miss the grave and far-reaching implications relative to any judicial decision establishing such a precedent.

Respectfully submitted,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND, Pro Se

APPENDIX E

DENIAL OF MOTION
(December 22, 1976)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

Present: ROSENN, KALODNER, and GARTH, Circuit Judges.

1. Appellant's motion for reconsideration and vacation of this Court's order dated December 6, 1976, denying the motion for default judgment filed on October 27, 1976, and ordering plaintiff to file a reply brief,

2. Copy of this Court's order dated December 6, 1976, sent by the undersigned for the Court's information,

in the above-entitled case.

The foregoing Motion is denied. The directive in the order of December 6 to file the reply brief was addressed to the Clerk of this court and not to the appellant.

/s/ Max Rosenn
MAX ROSENN

APPENDIX F

MOTION FOR RECONSIDERATION AND VACATION OF ORDER, ETC.

(December 27, 1976)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PLEASE TAKE NOTICE that I Clarence E. Edmond, plaintiff-appellant *pro se* herein, respectfully move the Court hereby, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure (F.R.A.P.), for reconsideration and vacation of the order entered herein by the Court on December 22, 1976 denying the previous motion for reconsideration and vacation of order filed herein by plaintiff on December 16, 1976, and for an order remanding the case to the court below for trial or other proper proceeding, for the following reasons: (Please refer to all pertinent papers filed herein relative to plaintiff's motion for judgment by default.) As a preliminary matter, it is emphatically submitted here that plaintiff is thoroughy convinced that this Court by its order of December 6, 1976 was indeed ordering the filing herein by plaintiff of a brief in reply to defendants' brief on the appeal (which was unlawfully served upon plaintiff on October 20, 1976), when it ordered that "Appellant's reply brief will be filed." Two sets of indisputable facts provide the basis for plaintiff's uncompromising conviction with respect to this crucial point: (1) The Court's language in the aforesaid order implied that the Court had unlawfully and improperly enlarged the time fixed for the filing and service of defendants' responsive pleadings, and

that it had thereby allowed the defendants to file and serve a (legally) nonexistent brief. Plaintiff consequently inferred that such was actually the case and proceeded, by way of a motion for reconsideration and vacation of said order, to show that said actions by the Court were clearly inconsistent with the applicable federal rules of appellate procedure. The defendants have not set forth any affirmative opposition to the relief demanded on said motion (as provided for by Rule 11(5) of the rules of this Court and by Rule 27(a) of the F.R.A.P.), which by law establishes all the facts contained therein and validates the stated implications and inferences and the arguments relative thereto. (2) Rule 27(a) of the F.R.A.P. provides for the filing of the motion, the response, and the reply. Plaintiff, on October 27, 1976, filed herein a motion for judgment by default. Twenty-one (21) days later (November 22, 1976), and fourteen (14) days after the expiration of the time fixed for the filing of a response to said motion, the defendants served and filed a brief in opposition thereto. Exhibit "A" annexed hereto indicates that the motion by default and any other pleadings relative thereto were due to be considered and decided by the Court on November 29, 1976, and presumably those acts were in fact accomplished on that date. In view of the facts that plaintiff (in person) properly filed his brief in reply to defendants' opposition brief on November 26th and the papers relative to the aforesaid motion were considered on November 29th, it becomes apparent that the Court by its order herein of December 6th could not logically have been referring to plaintiff's brief in reply to defendants' opposition brief. Plaintiff's brief in reply to the latter had already been filed! Are we to understand that this Court, on December 6th, ordered the clerk thereof to file plaintiff's brief in reply to defendants' opposition brief *after* the motion had already been decided? or that the said brief had not actually been

filed at the time of the aforesaid decision? And if the brief in question in fact had not been filed at the time of said decision, what purpose would have been served by ordering it filed on or after December 6th while simultaneously denying the relief demanded on the motion by default? (It should be noted here, too, that the Court issued no such an order when plaintiff submitted his brief on the appeal, nor did it issue any such orders when he submitted motions both prior and subsequent to the filing of that brief.)

As was pointed out in plaintiff's motion for reconsideration and vacation of order filed herein on December 16, 1976, the defendants have failed to answer the allegations set out in plaintiff's brief on the appeal. Accordingly, all the issues of fact and of law set forth in said brief have been legally and definitively adjudicated in favor of the plaintiff. In the concluding portion of his brief on the appeal, plaintiff asked this Court to remand his case to the court below for trial on the merits or other proper proceeding. Since the defendants have offered no recognizable opposition to any of the issues of fact and of law presented in any pertinent papers filed by plaintiff before this Court, plaintiff is clearly entitled as a matter of law to the relief demanded in the aforesaid brief. It is hereby requested, therefore, that this Court reconsider and vacate its denial of the preceding motion filed herein by plaintiff and remand the case to the District Court as is required under the applicable federal rules of civil-appellate procedure.

Respectfully submitted,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND,
Pro Se

EXHIBIT "A"

November 16, 1976

Mr. Clarence E. Edmond
38 Pleasure Bay Apts.
Atlantic Avenue
Long Branch, N.J. 07740

Re: Clarence E. Edmond, appellant
vs.
Dept. of the Public Advocate, et al.
No. 76-2164

Dear Mr. Edmond:

Receipt is acknowledged on October 28, 1976 of 4 copies of motion by appellant for judgment by default with certificate of service in the above-entitled case.

Pursuant to the provisions of Rule 11(1) of the Rules of this Court, you may assume that the motion will be* *considered* and decided on your papers, and on any response which may be timely received, and that *no oral argument* will be heard unless you are so advised.

*November 29, 1976

In the event that the Court or a Judge thereof requests oral argument, counsel will be notified as promptly as possible and will be expected to be present at the appointed time.

Very truly yours,

/s/ T. F. Quinn, Clerk

fm
Mary Catherine Cuff, Esq.
Deputy Attorney General, State of New Jersey
Div. of Law, Dept. of Law & Public Safety
Box 1869, Trenton, N.J. 08625

APPENDIX G

DENIAL OF MOTION
(January 6, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

Present: ROSENN, KALODNER, and GARTH, Circuit Judges.

1. Appellant's motion for reconsideration and vacation of this Court's order entered on December 22, 1976, denying appellant's previous motion for reconsideration and vacation of order, *and* for an order remanding case to the Court below for trial or other proper proceeding,

2. Copies of the following documents are sent by the undersigned for the Court's information:

1. This Court's order dated December 6, 1976;

2. This Court's order dated December 22, 1976,

in the above-entitled case.

The foregoing Motion is denied.

/s/ Max Rosenn
MAX ROSENN

APPENDIX H

MOTION FOR RECONSIDERATION AND VACATION OF ORDER

(January 13, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PLEASE TAKE NOTICE that I, Clarence E. Edmond, plaintiff-appellant *pro se* herein, respectfully move the Court hereby, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure (F.R.A.P.), for reconsideration and vacation of the Order entered herein by the Court on January 6, 1977 denying the Motion for Reconsideration and Vacation of Order and for Order Remanding Case to the Court Below filed herein by plaintiff on December 27, 1976, for the following reasons: (Please refer to plaintiff's Motion for Reconsideration and Vacation of Order filed herein on December 16, 1976, for several points of fact and of law currently before this Court are clearly analogous in respect of certain crucial points established in the course of that particular proceeding.)

POINT I

THE ORDER OF JANUARY 6, 1977 BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PLINTIFF'S MOTION HEREIN OF DECEMBER 27, 1976 IS BOTH ARBITRARY AND UNLAWFUL.

On January 6, 1977 this Court denied the relief demanded on the motion filed herein by plaintiff on December

27, 1976. That denial implies that the Court's decision was based upon careful evaluation and just consideration of issues of fact and/or of law presented by both parties to that particular proceeding. According to Rule 11(5) of the rules of this Court, the only way a motion can be affirmatively opposed is by the filing of a document "which clearly sets forth opposition to the relief demanded in the motion, or any part thereof," and by the filing of that document "within the time limitations of Rule 27, Federal Rules of Appellate Procedure." The following points of fact will reveal that the defendants herein have offered no opposition whatsoever to the relief demanded on plaintiff's motion of December 27, 1976: (1) plaintiff personally served the aforesaid motion on the defendants on December 27, 1976; (2) the defendants' pleadings responsive thereto were due to be both filed and served on or before *January 3, 1977* (seven [7] days from, but not including, the date of service upon them, December 27th aforenoted); (3) By way of a letter dated January 3, 1977, the defendants notified the Court that in opposition to plaintiff's motion herein of December 27th they would rely upon their "brief" filed in opposition to "appellant's" initial motion (Motion for Judgment by Default). Two copies of the aforesaid letter were sent to plaintiff in an envelope postmarked *January 4, 1977* (see Exhibit "A" annexed hereto), one day *after* the expiration of the time fixed for the filing and service of a *brief*, contrary to Rules 25(a) and 26(b) of the F.R.A.P. Cf. Motion for Reconsideration and Vacation of Order filed herein by plaintiff on December 16, 1976, p. 2, 1st and 3rd pars.; p. 3, 1st par.; see also p. 4, 3rd line beginning with "this"; see further p. 5, 2nd line, at "Clearly."

By reason of the defendants' failure to answer plaintiff's motion of December 16th, the analogies hereinabove set forth clearly obtain validity. Thus we arrive at the

[un]usual, indeed unprecedented, situation where this Court, a reputed impartial tribunal of justice, on January 6, 1977, had only one set of facts for consideration before it—those set forth by the plaintiff—and, in the absence of any affirmative opposition, indeed of any opposition at all, to the relief demanded on the motion containing those facts, denied relief that the defendants themselves plainly had not opposed.

It is clear from the foregoing that, since Rule 11(5) of the rules of this Court requires that affirmative opposition to a motion be filed within the time limitations of Rule 27 of the F.R.A.P., and that, since the defendants have obviously failed to act in accordance with the specific requirements of the said rules of procedure, this Court, by its Order herein of January 6th, has *arbitrarily* denied the relief demanded on the aforesaid motion. Moreover, since the defendants' failure to respond to any of the issues of fact and of law set forth by plaintiff in any of his papers entitles him as a matter of law to the relief demanded thereon, it follows that this Court is clearly compelled by the law to grant the relief so demanded and that its action of January 6, 1977 constitutes not only persistent disregard of the Federal Rules of Civil-Appellate Procedure but also a multiplicity of *unlawful* refusals to do that which it is compelled by law to do.

Respectfully submitted,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND,
Pro Se

STATE OF NEW JERSEY
DIVISION OF LAW
DEPARTMENT OF LAW AND PUBLIC SAFETY
BOX 1968
TRENTON 08625
REFUND POSTAGE GUARANTEED

CERTIFIED MAIL
No. 109-34

RETURN RECEIPT REQUESTED

Mr. Clarence E. Edmond
38 Pleasure Bay Apartments
Atlantic Avenue
Long Branch, New Jersey 07740

RETURN RECEIPT REQUESTED

EXHIBIT "A"

APPENDIX I

DENIAL OF MOTION
(January 24, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

Present: ROSENN and KALODNER, Circuit Judges.

1. Appellant's motion for reconsideration and vacation of this Court's order entered on January 6, 1977, denying the Motion for Reconsideration and Vacation of Order and for Order Remanding Case to the Court Below, filed by plaintiff on December 27, 1976,

2. Appellees' letter-answer dated January 19, 1977, to appellant's motion for reconsideration and vacation of this Court's order dated January 6, 1977,

in the above-entitled case.

The foregoing Motion, after consideration of the answer filed by the appellee and the lack of any prejudice to the appellant by the late filing of appellee's brief, is denied.

/s/ Max Rosenn
MAX ROSENN

APPENDIX J

MOTION FOR RECONSIDERATION AND VACATION OF ORDER, ETC.

(January 31, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PLEASE TAKE NOTICE that I, Clarence E. Edmond, plaintiff-appellant *pro se* herein, respectfully move the Court hereby, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure (F.R.A.P.), for an Order directing the defendants herein to furnish the Court and the Plaintiff with copies of the motion wherein plaintiff (allegedly) petitioned the Court for an Order striking defendants brief on the appeal, and for reconsideration and vacation of the Order entered herein by the Court on January 24, 1977 denying the Motion for Reconsideration and Vacation of Order filed herein by plaintiff on January 13, 1977, for the following reasons: (Please refer to plaintiff's Brief in Reply to Defendant-Respondents' Opposition to Motion for Judgment by Default and to his Motion for Reconsideration and Vacation of Order, the latter of which was filed herein on December 16, 1976.) The Court's denial on January 24, 1977 of the relief demanded in plaintiff's motion of January 13, 1977 was admittedly based upon consideration favorable to the defendants of a letter dated January 19, 1977 and addressed and directed to the clerk of this Court, Mr. Thomas F. Quinn. Rule 11(5) of the Rules of this Court requires that the adversary in motion proceedings, in order

to defeat the relief demanded on a motion, file a document which clearly sets forth affirmative opposition to the relief demanded therein. The defendants, as we shall see, presently, have presented nothing which even approximates a fulfillment of the particular provision of Rule 11(5) set out above.

The point argued by plaintiff in his motion of January 13th was that this Court's Order of January 6, 1977 denying plaintiff's motion of December 27, 1976 was both arbitrary and unlawful. The defendants, by their own admission, submitted their letter of January 19th to Mr. Quinn "in response to appellant Clarence E. Edmond's third motion for reconsideration of his motion for an order to strike respondents' brief." And they alleged in said letter that "Mr. Edmond sought to thave respondents', Department of Public Advocate et als, brief striken [sic]." Plaintiff, at p. 6 of his brief in reply to defendants' brief in opposition to the motion herein for judgment by default, promptly rebutted defendants' fallacious claims relative to this crucial point. Then, in his motion of December 16, 1976, at p. 4, part B, plaintiff alleged in essence that the defendants' surreptitious claim to the effect that he had previously moved this Court for an Order striking their brief on the appeal was merely a ruse contrived by them in an effort to bring that brief into legal existence. The defendants' failure to oppose the relief demanded in the motion of December 16th confirms the statements contained therein declaring in effect that plaintiff never moved this Court for any Order striking defendants' brief on the appeal.

The controlling factor, then, in respect of the instant motion is clearly the question of whether plaintiff ever filed a motion before this Court for an Order striking defendants' brief on the appeal. The defendants and the plaintiff have locked horns on the issue and it is now evident that we

cannot of our own volition extricate ourselves from the legal complexities occasioned thereby. Wherefore the plaintiff hereby invokes the power of this Court to obtain an Order directing the defendants to furnish the Court and the plaintiff with copies of the motion wherein plaintiff asked the Court for relief in the form of an Order striking their brief on the appeal, with reference to the specific point in said motion whereat the relief in question is (allegedly) demanded. A failure on the part of the defendants to produce copies of such a motion would not only resolve the crucial issue at hand but also show conclusively that the defendants have failed to respond to the issues of fact and of law raised by plaintiff in his motion of January 13, 1977, having admitted, as they did, via the aforesaid letter of January 19th to the clerk of the court, that they responded to a motion which clearly does not exist. Moreover, a failure on the part of the defendants to offer in evidence copies of the motion in question would lead inescapably to the conclusion that the plaintiff was indeed entitled as a matter of law to the relief demanded on the aforesaid motion of January 13th.

Respectfully submitted,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND,
Pro Se

APPENDIX K

DENIAL OF MOTION
(February 4, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

Present: ROSENN and KALODNER, Circuit Judges.

1. Appellant's motion for an Order directing defendants to furnish the Court and appellant with copies of the motion wherein plaintiff (allegedly) petitioned the Court for an Order striking defendants' brief on appeal, and for reconsideration and vacation of the Court's order of January 24, 1977,

2. Copy of this Court's order dated January 24, 1977, sent by the undersigned for the Court's information,

3. Copy of this Court's docket entries sent by the undersigned for the Court's information,

in the above-entitled case.

The foregoing Motion is denied.

/s/ Max Rosenn
MAX ROSENN

APPENDIX L

MOTION FOR RECONSIDERATION AND VACATION OF ORDER, ETC.

(February 16, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PLEASE TAKE NOTICE that I, Clarence E. Edmond, plaintiff-appellant *pro se* herein, respectfully move the Court hereby, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure (F.R.A.P.), for reconsideration and vacation of the Order entered herein by the Court on February 4, 1977 denying the relief demanded by plaintiff in his motion herein of January 31, 1977, specifically, that in the form of reconsideration and vacation of the Court's Order herein of January 24, 1977, and for an Order remanding the case to the court below, for the following reasons: (Please refer to all pertinent papers filed herein relative to plaintiff's motion for judgment by default.) Each of the motions herein filed by the plaintiff after the filing herein of his motion for judgment by default contained in common with each that it preceded and/or followed a demand for relief in the form of reconsideration and vacation of a previous Order. Each new motion for reconsideration was based on substantial issues of fact and of law against which the defendants above-named to date have consistently failed to defend successfully by a timely offering thereto of any affirmative opposition. Since a particular provision of Rule 11(5) of the rules of this Court specifically calls for such opposition as the sole means of defeating the relief

demanded on a motion, the consistent failure on the part of the above-named defendants to comply with the said provision of the said rule plainly signifies the utter impropriety of the action of this Court in respect of its persistent denial of the relief repeatedly demanded herein by the plaintiff. Had the Court properly recognized the issues of fact and of law set forth by the plaintiff in support of the aforesaid motions for reconsideration, it could not in good faith have done other than to grant the other aspect of the relief demanded in said motions: vacation of the Orders which had occasioned the relief so demanded.

The failure on the part of the defendants herein to offer affirmative opposition to the relief demanded by plaintiff in the aforesaid motions constitutes failure by them to answer the allegations contained in said motions and by law, therefore, establishes the facts therein alleged. And because each new demand herein for relief in the form of reconsideration has arisen from some type of improper action on the part of this Court, it follows logically that a grant of that particular relief in respect of the instant matter would properly and necessarily result in the automatic and successive vacation of the Orders entered herein by the Court on January 24th, and 6th, 1977, and on December 22nd, and 6th, 1976.

One of the motions filed herein by the plaintiff—that of December 27, 1976—among other things pointed out specifically that the defendants herein had failed to answer plaintiff's brief on the appeal, which brief has demonstrated beyond question that the court below, on June 2, 1976, had improperly entered summary judgment in favor of the defendants, and the said motion alleged in effect that the court below, by the action aforesaid, had also improperly subjected plaintiff to the deprivation of his right to a trial by jury, in violation of the Seventh and Fourteenth Amend-

ments to the Constitution of the United States. The defendants not only failed to respond to the issues of fact and of law set forth by plaintiff in his brief on the appeal, they also failed to respond to the allegations alleged in the aforesaid motion of December 27th pointing up the effects of such failure, which clearly indicated plaintiff's entitlement to the relief demanded in said motion.

Similarly with respect to plaintiff's motion of January 13, 1977, in which the action of this Court was properly challenged as being both arbitrary and unlawful, the defendants, as usual, failed to defend and thereby established the facts alleged. Indeed, all the Orders herein entered by the Court to date have been arbitrary and unlawful, representing, as they do, multiple denials of lawful relief, clearly unattended by due consideration of any affirmative opposition to such relief required herein by specific rule.

In light of the foregoing, it is apparent that this Court, in like manner with the court below, is improperly denying to plaintiff the right to a trial by jury, which act is plainly and strictly prohibited by the Constitution of the United States. Wherefore the plaintiff hereby urgently requests again that the Court forthwith enter herein an Order remanding this case to the court below for trial on the merits or other proper proceeding.

Respectfully submitted,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND,
Pro Se

APPENDIX M

DENIAL OF MOTION
(March 2, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

Present: ROSENN, KALODNER and GARTH, Circuit Judges.

1. Appellant's motion for reconsideration and vacation of specific aspect of this Court's order dated February 4, 1977, etc. and for order remanding case to the Court below

in the above-entitled case.

The foregoing Motion is denied.

/s/ Max Rosenn
MAX ROSENN

APPENDIX N

MOTION FOR RECONSIDERATION AND VACATION OF ORDER
(March 25, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PLEASE TAKE NOTICE that I, Clarence E. Edmond, plaintiff-appellant *pro se* herein, respectfully move the Court hereby, pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure (F.R.A.P.), for reconsideration and vacation of the Order entered herein by the Court on March 2, 1977 denying the motion herein filed by plaintiff on February 16, 1977, for the following reasons: The aforesaid motion of February 16th set forth the following crucial points of fact:

(1) Each motion filed herein by the plaintiff after the filing herein of his motion for judgment by default has requested reconsideration and vacation of a previous Order, based on substantial issues of fact and of law to which the defendants in this action have consistently failed to offer any affirmative opposition;

(2) Rule 11(5) of the rules of this Circuit specifically calls for such opposition as the sole means of defeating the relief demand in a motion; so that this Court's persistent denial of the relief herein demanded by plaintiff is irrational, and totally improper;

(3) The failure on the part of the defendants to oppose the relief demanded in the aforesaid motions constitutes failure by them to answer the allegations contained therein and by law, therefore, established the facts therein alleged;

(4) A grant of the relief demanded in plaintiff's motion herein if February 16th would properly and necessarily result in the automatic and successive vacation of the Orders entered herein by the Court on January 24th, and 6th, 1977, and on December 22nd, and 6th, 1976;

(5) All the Orders herein entered by the Court to date have been both arbitrary and unlawful; and

(6) The court below, by improperly entering summary judgment for the defendants herein, has subjected plaintiff, in violation of the Seventh and Fourteenth Amendments, to the deprivation of his right to a trial by jury; and this Court, by reason of its arbitrary and capricious actions, in like manner with the court below, also, now, is subjecting plaintiff to the deprivation of his right to a trial by jury.

On February 14, 1977 plaintiff served two copies of the aforesaid motion of February 16th on counsel for the defendants. The latter's opposition paper was due to be filed and served by February 24, 1977. On March 5th, and 16th, 1977, plaintiff requested by letter that the clerk of the court advise him whether he (the clerk) had received from the defendants a paper in opposition to the aforesaid motion. By way of a letter dated March 18, 1977 Chief Deputy Clerk Ferguson responded in the following terms: "[a]s of this date, we have not received any opposition from counsel for appellees to your motion of February 16, 1977." In consideration of the foregoing points of fact, the significance

of this information is crystal clear: that in the absence of any opposition whatsoever to the relief demanded in the motion, this Court has again without cause denied relief to which plaintiff was clearly entitled. (Cf. plaintiff's motion herein of January 13, 1977, p. 3, par. 1, l. 3; the two situations are conspicuously analogous.)

Plaintiff has repeatedly and properly asked this Court to remand his case to the court below for trial on the merits or other proper proceeding. He in each instance has had a right to make that demand; the Court, a corresponding duty to perform. A denial of the relief demanded in the motion *sub judice* would constitute an outrageous and persistent display of contempt of the pertinent rules of procedure herein and of the Seventh and Fourteenth Amendments to the Constitution of the United States. Wherefore, plaintiff hereby respectfully requests reconsideration and vacation of the preceding Order.

Respectfully submitted,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND,
Pro Se

APPENDIX O

DENIAL OF MOTION
(March 31, 1977)

Edmond v. Departme .:
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

Present: ROSENN, Circuit Judge.

1. Appellant's motion for reconsideration of this Court's order dated March 2, 1977, and Vacation of order,

2. Letter dated March 25, 1977 from counsel for appellees in answer to appellant's motion for reconsideration and vacation of order,

3. Copy of this Court's order dated March 2, 1977, sent by the undersigned for the Court's information

in the above-entitled case.

The foregoing Motion is denied[.]

/s/ Max Rosenn
MAX ROSENN

APPENDIX P

MOTION FOR RECONSIDERATION AND VACATION OF ORDER
(April 5, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PLEASE TAKE NOTICE that I, Clarence E. Edmond, plaintiff-appellant *pro se* herein, respectfully move the Court hereby, pursuant to Rule 27 (a) and (c) of the Federal Rules of Appellate Procedure (F.R.A.P.), for reconsideration and vacation of the Order entered herein by the Honorable Max Rosenn on March 31, 1977, for the following reasons: (Please refer to plaintiff's brief in reply to defendant's brief in opposition to plaintiff's motion herein for judgment by default, and to plaintiff's motions herein of December 16, 1976 and of January 31, 1977.)

> "A motion is affirmatively opposed only when a document is filed which clearly sets forth opposition to the relief sought in the motion, or any part thereof. . . ."

So says in relevant part Rule 11 (5) of the rules of this Circuit. As we shall see presently, however, Judge Rosenn, on March 31, 1977, improperly denied the relief demanded by plaintiff in his motion herein of March 25th, having done so in the absence of any material objection to that relief on the part of the defendants herein. The principal points made in the said motion of March

25th were the following: (1) plaintiff has repeatedly and properly asked this Court to remand his case to the District Court for trial on the merits or other proper proceeding; (2) he in each instance has had a right to make that demand; the Court, a corresponding duty to perform; and (3) a denial by the Court of the said motion of March 25th would amount to a show of contempt of the applicable rules of procedure herein and of the Seventh and Fourteenth Amendments to the Constitution of the United States.

In opposition to that motion, the defendants relied on their brief in opposition to plaintiff's motion herein for judgment by default and on their letter to the clerk of the court dated January 19, 1977.

The point argued in the aforesaid brief (filed on November 22, 1976) was that "an order striking defendants brief [on the merits] would be unwarranted factually and inappropriate. . . ." Under POINT II of his brief in opposition thereto, plaintiff demonstrated in unequivocal terms that he in fact had not asked the Court for any Order or Rule striking defendants' brief. And under POINT I (B) of his motion herein of December 16th, plaintiff amplified his position with respect to that particular point. The defendants failed to answer that motion, which plainly indicated that they indeed had therefore opposed relief that plaintiff had not requested. Nor has plaintiff *since* placed any such request before the Court, so that the defendants' reliance on the brief in question as opposition to the aforesaid motion of March 25th constitutes a failure by them to affirmatively oppose the relief therein requested and renders improper Judge Rosenn's denial of that request.

The defendant's letter herein of January 19th, too, is completely unresponsive to the question of whether this

Court is in violation of the pertinent federal rules of civil-appellate procedure and of the Seventh and Fourteenth Amendments to the Constitution of the United States. In support of this assertion, a turn to plaintiff's motion herein of January 31st is now in order. Plaintiff there observed that the defendants, by their own admission, had submitted the aforesaid letter "in response to appellant Clarence E. Edmond's third motion for reconsideration of his motion for an order to strike respondents' brief." It has been amply demonstrated heretofore that plaintiff never filed any such motion and that the defendants' letter of January 19th, therefore, was submitted in response to a motion which obviously did not and does not exist. And since that letter did not adequately refute the allegations contained in plaintiff's motion herein of January 13th charging the Court with acting arbitrarily and unlawfully, *a fortiori* it is not adequately refutative of the allegations contained in the aforesaid motion of March 25th charging the Court with being in contempt of the pertinent rules of procedure herein and of the aforesaid constitutional amendments.

By reason of the obvious insufficiency of the defendants' pleadings, plaintiff hereby respectfully requests that the Court review and vacate the Order herein entered by Judge Rosenn on March 31, 1977.

Respectfully submitted,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND, Pro Se

APPENDIX Q

DENIAL OF MOTION
(April 11, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

Present: ROSENN, Circuit Judge.

1. Appellant's motion for reconsideration and vacation of this Court's order dated March 31, 1977,

2. Copy of this Court's order dated March 31, 1977, sent by the undersigned for the Court's information,

in the above-entitled case.

The foregoing Motion is denied.

/s/ Max Rosenn
MAX ROSENN

APPENDIX R

MOTION FOR RECONSIDERATION AND VACATION OF ORDER
(April 25, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PLEASE TAKE NOTICE that I, Clarence E. Edmond, plaintiff-appellant *pro se* herein, respectfully move the Court hereby, pursuant to Rule 27(a) and (c) of the Federal Rules of Appellate Procedure (F.R.A.P.), for reconsideration and vacation of the Order entered herein by the Honorable Max Rosenn on April 11, 1977 deny-the relief demanded in plaintiff' motion herein of April 5, 1977, for the following reasons: (Please refer to the said motion of April 5th). The principal point made in said motion was that the defendants' brief of November 22, 1976 and their letter of January 19, 1977 submitted in opposition to plaintiff's motion herein of March 25, 1977 were not sufficient to defeat the relief demanded in the latter; and by reason thereof, plaintiff properly requested that this Court review and vacate Judge Rosenn's Order of March 31, 1977 denying that particular relief.

Judge Rosenn's denial of the aforesaid motion of April 5th implies that the defendants filed and served some form of affirmative opposition to that motion, in accordance with Rules 25(a) and (b) and 27(a) of the F.R.A.P. and Rule 11(5) of the Rules of this Court.

Not having received a copy of any such opposition—the paper was due to be both filed and served on or before April 14, 1977—and suspecting that the defendants might well be in violation of his right to due process of law (by not having served such a paper), plaintiff, on April 14, 1977, sent a letter to counsel for the defendants, requesting therein that she forward to him a copy of the opposition paper in question on or before April 20, 1977. Also, plaintiff indicated in said letter that if he received no response thereto from counsel, he would assume that no paper in opposition to the aforesaid motion (of April 5th) had been filed on behalf of the defendants.

As of this date (April 20, 1977), plaintiff has received no response from counsel, which plainly indicates the fact of defendants' awareness of the insufficiency of the aforesaid pleadings and of plaintiff's entitlement to the relief denied by Judge Rosenn on April 11, 1977.

Wherefore, plaintiff hereby requests that the Court review and vacate the preceding Order entered herein by Judge Rosenn.

Respectfully submitted,

/s/ Clarence E. Edmond
CLARENCE E. EDMOND, Pro Se

APPENDIX S

DENIAL OF MOTION
(May 11, 1977)

Edmond v. Department
of the Public Advocate, etc., et al.
Docket No. 76-2164

United States Court of Appeals
for the Third Circuit

PRESENT: ADAMS, ROSENN and WEIS, *Circuit Judges.*

After consideration of the motion by appellant for reconsideration and vacation of the order entered by Judge Rosenn on April 11, 1977 in the above-entitled case,

It is ORDERED that appellant's motion for reconsideration and vacation of the order entered by Honorable Max Rosenn on April 11, 1977, which denied the relief demanded in plaintiff's motion dated April 5, 1977, be and hereby is denied.

/s/ Arlin M. Adams
ARLIN M. ADAMS